

10-15387

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAMUEL MICHAEL KELLER,
Plaintiff and Appellee,

v.

ELECTRONIC ARTS INC.,
Defendant and Appellant.

On Appeal from an Order of the United States District Court
for the Northern District of California,
The Honorable Claudia A. Wilken
Case No. 3:09-CV-01967-CAW

**JOINT NOTICE OF DISTRICT COURT'S INDICATIVE RULING AND
JOINT MOTION FOR LIMITED REMAND**

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER - #120162
ALONZO WICKERS IV - #169454
KAREN A. HENRY - #229707
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

KEKER & VAN NEST, LLP
ROBERT A. VAN NEST - #84065
STEVEN A. HIRSCH - #171825
R. JAMES SLAUGHTER - #193813
633 Battery Street
San Francisco, California 94111
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Attorneys for Defendant/Appellant
Electronic Arts Inc.

HAGENS BERMAN SOBOL
SHAPIRO LLP
ROBERT B. CAREY
LEONARD W. ARAGON
11 West Jefferson Street, Suite 1000
Phoenix, Arizona 85003
Telephone: (602) 840-5900
Facsimile: (602) 840-3012

THE PAYNTER LAW FIRM PLLC
STUART M. PAYNTER
1200 G Street N.W., Suite 800
Washington, DC 20005
Telephone: (202) 626-4486
Facsimile: (866) 734-0622

Attorneys for Plaintiff/Appellee
Samuel Michael Keller

Pursuant to Federal Rule of Appellate Procedure 12.1, appellant Electronic Arts Inc. (“EA”) and appellee Samuel Michael Keller (“Keller”) (collectively, the “Parties”), through their respective counsel, respectfully submit this Joint Notice of District Court’s Indicative Ruling and Joint Motion for Limited Remand.

A. FACTUAL SUMMARY

On July 31, 2013, this Court issued an opinion affirming the district court’s denial of EA’s special motion to strike the complaint in this matter. (*See* ECF No. 167-1.) Three weeks later, on August 21, 2013, the Court stayed the mandate pending the filing of EA’s petition for a writ of certiorari. (*See* ECF No. 169.) EA filed the certiorari petition on September 23, 2013. *See Electronic Arts Inc. v. Keller*, No. 13-377 (U.S. Sept. 23, 2013). On October 11, 2013, and several times since then, the Supreme Court issued orders extending Keller’s time to respond to the petition. *Id.* Currently, the response deadline is October 6, 2014. *Id.*

In the months since EA filed its petition, the parties have been in negotiations and now have reached a proposed settlement agreement (the “Settlement”). If approved, the Settlement would resolve all claims between them in the district court and on appeal.

B. LIMITED REMAND IS APPROPRIATE IN THIS CASE.

Limited remand enables a district court to consider a motion that it otherwise could not because of a pending appeal. Federal Rule of Appellate Procedure

12.1(b) provides that once the district court indicates either (1) that it would grant the motion, or (2) that the motion “raises a substantial issue, the court of appeals may remand for further proceedings[.]” *See, e.g., In re Wells Fargo Mortgage-Backed Certificates Litigation*, 2011 U.S. Dist. Lexis 81196, at *9 (N.D. Cal. July 26, 2011) (issuing indicative ruling that district court would approve a proposed settlement if the court of appeals remanded the matter for that purpose).

Ordinarily, the circuit court retains jurisdiction, and the parties “must promptly notify the circuit clerk when the district court has decided the motion on remand.” Fed. R. App. P. 12.1(b). To set the process in motion, the parties first move in the district court for an indicative ruling, then notify the circuit court once it has been issued. *Id.*; *see also* Fed. Rule of Civ. P. 62.1. If the circuit court grants the limited remand, the district court may then decide the motion. *Id.*; *see also Connors v. McDaniel*, 2013 U.S. Dist. Lexis 94210, at *12 (D. Nev. July 5, 2013) (granting motion to amend petition on limited remand from the Ninth Circuit).

In this matter, the Parties filed a joint administrative motion in the district court on July 9, 2014 for an indicative ruling, pursuant to Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1(b). The joint motion requested that the district court indicate either: (1) preliminary approval of the Settlement and that, if this Court remands the matter, it would grant final approval, or (2) that approval of the Settlement “raises a substantial issue.” Fed. R. Civ.

Proc. 62.1(a)(3). On July 11, 2014, the district court granted the joint motion for an indicative ruling. *See* Exhibit A. The district court ordered that:

[T]he Court hereby indicates that if the claims at issue in EA's appeal are remanded to this Court by the U.S. Court of Appeals for the Ninth Circuit pursuant to Fed. R. App. 12.1 and Fed. R. Civ. P. 62.1, the Court is inclined to grant the motion for preliminary approval of the Settlement, and upon Notice to the Settlement Class and an opportunity to be heard, and upon a finding that the proposed Settlement is fair, reasonable and adequate, would grant final approval of the Settlement if the Court of Appeals remands for that purpose. The preliminary approval of the Settlement "raises a substantial issue" justifying limited remand to the district court.

Keller v. Electronic Arts Inc., et al., No. CV-09-1967-CW (NC) (N.D. Cal. July 11, 2014) (order granting joint administrative motion).

Accordingly, the Parties now jointly move this Court to remand this matter for the limited purpose of allowing the district court to consider the Settlement and, if the district court grants final approval of it, to enter a final judgment and any other orders relating to the Settlement. If this Court grants the limited remand, the Parties will provide prompt notice once the district court makes its final ruling on

the Settlement. If the district court approves the Settlement, EA will move to dismiss its appeal.

RESPECTFULLY SUBMITTED this 16th day of July, 2014.

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
ALONZO WICKERS IV
KAREN A. HENRY

KEKER & VAN NEST, LLP
ROBERT A. VAN NEST
STEVEN A. HIRSCH
R. JAMES SLAUGHTER

By / s / Alonzo Wickers IV
Alonzo Wickers IV

Attorneys for Defendant/Appellant
ELECTRONIC ARTS INC.

HAGENS BERMAN SOBOL SHAPIRO
LLP
ROBERT B. CAREY
LEONARD W. ARAGON

THE PAYNTER LAW FIRM PLLC
STUART M. PAYNTER

By / s / Leonard W. Aragon
Leonard W. Aragon

Attorneys for Plaintiff/Appellee
SAMUEL MICHAEL KELLER

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT OF CALIFORNIA
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SAMUEL MICHAEL KELLER, on behalf
of himself and all others similarly situated,,

Plaintiff,

v.

ELECTRONIC ARTS INC.; NATIONAL
COLLEGIATE ATHLETICS
ASSOCIATION; COLLEGIATE
LICENSING COMPANY,

Defendants.

Case No. CV-09-1967-CW (NC)
Court of Appeal Case No. 14-71522

**ORDER GRANTING JOINT
ADMINISTRATIVE MOTION UNDER
FEDERAL RULE OF CIVIL
PROCEDURE 62.1 AND FEDERAL RULE
OF APPELLATE PROCEDURE 12.1**

Judge: Hon. Claudia Wilken

Date Filed: May 5, 2009

1 THIS MATTER came before the Court on the Joint Administrative Motion for Indicative
2 Ruling Under Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1
3 filed on July 9, 2014. The Court finds the Motion is well-taken and hereby GRANTS the
4 MOTION.

5 IT IS ORDERED that the Court hereby indicates that if the claims at issue in EA's appeal
6 are remanded to this Court by the U.S. Court of Appeals for the Ninth Circuit pursuant to Fed. R.
7 App. 12.1 and Fed. R. Civ. P. 62.1, the Court is inclined to grant the motion for preliminary
8 approval of the Settlement, and upon Notice to the Settlement Class and an opportunity to be
9 heard, and upon a finding that the proposed Settlement is fair, reasonable and adequate, would
10 grant final approval of the Settlement if the Court of Appeals remands for that purpose. The
11 preliminary approval of the Settlement "raises a substantial issue" justifying limited remand to the
12 district court.

13 IT IS SO ORDERED

14 Dated: 7/11/2014

15 By: 
16 THE HONORABLE CLAUDIA WILKEN
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

KELLER et al,

Plaintiff,

v.

ELECTRONIC ARTS INC. ET AL et al,

Defendant.

Case Number: CV09-01967 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 11, 2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Dated: July 11, 2014

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

9th Circuit Case Number(s) 10-15387

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) July 16, 2014 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Bryan Clobes
Cafferty Clobes Meriwether & Sprengel LLP
1101 Market Street, Ste. 2650, Philadelphia, PA 19107
Lee Albert
MURRAY FRANK & SAILER LLP
275 Madison Avenue, Ste. 801, New York, NY 10016



Signature (use "s/" format)

/ s / Yvonne Godson